THE CORPORATION JOURNAL

(REGISTERED U. S. PAT. OFFICE)

VOL. X, No. 12 DECEMBER, 1932 PAGES 265-288

COMPLETE NUMBER 205

Published by
THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation, and maintenance of corporations, is to deal with members of the bar, exclusively.

Diversity of Citizenship and Jurisdiction of Federal Courts.

To remove all possible doubt we wish to make it clear that the fact that we gave space on the front cover of The Corporation Journal for November, 1932, to Judge Bourquin's reference to "the pending Norris Bill" should not be taken as indicating in any way that we favor the passage of the Norris Bill or of any other similar legislation.

Force of Punctuation Marks in Laws.

In deciding United States vs. Shreveport Grain & Elevator Company (No. 19.—October Term, 1932) on November 7, 1932, the United States Supreme Court said (opinion delivered by Mr. Justice Sutherland): "Punctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed."

Kenneth Kingsley

President.

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The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve the Journal in a permanent file, a special and very convenient form of binder will be furnished at cost ($1.50).

Contents for December

Cumulative Voting

Fletcher, in his "Cyclopedia Corporations," (Vol. 3, page 2819) defines cumulative voting, as, "Where a stockholder, having a number of votes equal to the number of directors to be chosen, is allowed to cast the whole number for one person, or to distribute them as he may see fit, instead of casting one for each officer. It is intended to secure representation of minority stockholders on the board of directors."

Cumulative voting, of course, does not exist as a matter of right. There must be an express provision allowing it, generally found in the statute, and given effect as therein provided. In certain states the Constitution provides for the casting of votes in this manner.

In Delaware cumulative voting is permitted when the certificate of incorporation so provides. But, as was held in the case of *Standard Scale & Supply Corporation v. Chappel*, 141 Atlantic 191, should votes be cumulated when in fact there was no provision for such action in the certificate, this alone would not be cause to disregard the ballots entirely, as they should be counted as straight votes for the persons designated, since in the absence of a statutory form of ballot any form determining the intent of the voter may be used.

There can be no doubt of the benefit of cumulative voting to the minority stockholder, since in the absence of a provision allowing the casting of votes in this manner, the majority could consistently outvote the minority. However, it is possible for the element of surprise to enter into an election in which cumulative voting is allowed, as in certain instances it is mathematically possible for the minority to outvote the majority and secure control of the corporation. Instances of this nature are rare, naturally, but possible, nevertheless. In certain jurisdictions a minority stockholder must openly announce in the meeting before the balloting that he intends to vote in this manner, eliminating, of course, the element of surprise.

Domestic Corporations

Georgia.

Charter amendment by less than unanimous consent. The Supreme Court of Georgia says, here, (affirming the judgment below), that in Georgia the general rule is that to amend the charter of a commercial corporation, when the proposed amendments are fundamental, radical, or vital, the unanimous consent of all of the stockholders is required, except in those cases where the original incorporators have sought and obtained from the superior court at the time of granting the charter, the power to make such amendments by less than a unanimous vote of the stockholders. "Whether such power was sought and granted will be determined by the petition for charter and the judgment rendered thereon." A mere grant of authority to amend by a vote of the majority of the stock outstanding is not sufficient to effect fundamental, radical, or vital amendments by other than unanimous consent. Here a slight change in name (far from a complete change) was considered not to be vital, radical or fundamental. Moreover, says the court, at the time of the granting of the charter for the corporation involved, power was given to amend by a majority vote, and by a similar vote to dispose of its assets, liquidate its business, and surrender its charter. "The amendments here mentioned," continues the court, "are certainly 'vital, radical, and fundamental'," and so "under such provisions a majority of the shareholders could apply for and obtain the charter amendment proposed in the present instance." *Cathcart v. Cathcart Van & Storage Co.*, 165 S. E. 58. Arnold, Arnold & Gambrell, and Dean J. Ratliffe, all of Atlanta, for plaintiff in error. Burress & Dillard, of Atlanta, for defendant in error.

Minnesota.

Right of corporation to sell all assets against the will of a minority of its stockholders. Two Minnesota corporations determined, by large majority votes, to consolidate into a Delaware corporation, the stockholders of the old companies to exchange their stock, share for share, for stock in the new Delaware corporation. A small minority of one of the Minnesota corporations dissented and this action in restraint followed. We do not go into the merits, or the outcome except to say that the Supreme Court of Minnesota suggests a way out to the end that equity may be done to both parties and further litigation avoided. There is interesting discussion, with many citations, of the strict and liberal rules variously adopted or applied in determining the question suggested by the caption hereof. The court says that in no proper sense was there to be, under the plan of consolidation, a selling of the assets of the corporation of which the dissenters are stockholders. Therefore, "the Minnesota statutes (relating to sale of assets) do not affect this case." When the two companies were organized the statutes were silent on the matter

of the sale by a corporation of all of its assets; in 1925 a two-thirds-vote statute (Session Laws of 1925, Chap. 320) was enacted (certificate of incorporation may require more) applicable to "every corporation heretofore or hereafter organized under the laws of this state"; in 1927 a dissenting-stockholder's-share-appraisal provision was written into the law. The court says, here,—and hence this paragraph: "What in the future may be held under Laws 1925, p. 399, c. 320, as to the sale of a corporation's assets, and whether the statute constitutionally applies to stockholders of corporations in existence prior to the statute, we do not anticipate. The result in this action is not dependent upon the 1925 statute." *Paterson et al. v. Shattuck Arizona Copper Co. et al.*, 244 N. W. 281. Hugh J. McClearn and John G. Williams, both of Duluth (Oscar Mitchell, of Duluth, of counsel), for appellants (Copper Co. et al.). Harris Richardson, of St. Paul, for respondents.

On the so-called "double liability" of stockholders of Minnesota corporations. On a petition by the receiver of a Minnesota corporation for an order assessing stockholders. The United States Circuit Court of Appeals, Eighth Circuit, affirms the order below granting the petition and directing an assessment. One point insisted on in opposition to the order is the fact of the adoption and ratification in November, 1930, of the amendment of the state constitution (Section 3 of Article 10) conferring on the Legislature power to limit and regulate the liability of stockholders. Previously, by virtue of the constitutional provision prior to its amendment (liability to amount of stock held), and of Section 7465 of the statutes (liability to extent of unpaid amounts on subscriptions), the double liability existed. Here, the liability of the stockholders (a contract relationship between stockholders and creditors of the corporation) accrued prior to the adoption of the constitutional amendment (which, seemingly, left Section 7465 as the legislative voice on the matter). The court says that apparently any attempted state abridgement of vested contractual rights would fall within the inhibitions of the Federal constitution, "but we do not find it necessary to base our conclusion upon that ground," for Chapter 210, Minnesota Laws of 1931, which provides, in effect, that to extent of ordinary business corporations, the liability of stockholders shall not be otherwise than as provided in Section 7465, provides, also, that "this act shall not affect any existing liability" thus, continues the court, "preserving all existing contractual liabilities such as those sought to be enforced by this assessment order." *Saetre et al. v. Chandler,*

57 F. (2d) 951. Ray Quinlivan, of St. Cloud (Alex Janes, of St. Paul, and P. L. Solether, Claude G. Krause, and Glen S. Stiles, all of Minneapolis, on the brief), for appellants Saetre and others. F. H. Peterson, of Moorhead, for appellant Christenson. N. F. Field and Cyrus A. Field, both of Fergus Falls, for appellant Melby. Thomas Vennum, of Minneapolis (Gates A. Timerman, of Minneapolis, on the brief), for appellee Chandler, as receiver.

New Jersey.

Court of Chancery refuses to appoint a receiver for a solvent domestic corporation. It was conceded, here, that the corporation involved is solvent. Suit by minority stockholders for an injunction restraining the officers and directors from exercising any of the corporation's privileges and franchises, and asking that a receiver be appointed under the provisions of Section 65 of the New Jersey Corporation Act. Prior to the bringing of the suit there had been a change in management (directors and officers). The New Jersey Court of Chancery declines to grant the relief prayed for either under the provisions of Section 65, or under the general equity powers of the court. "The authority of the directors in the conduct of the corporation's business must be regarded as absolute when they act within the law. It is a well-known rule of law that questions of policy of management are left solely to the honest decision of the directors of a corporation. A receiver will not be appointed for a corporation which is not insolvent, at the suit of minority stockholders, solely because of errors of business judgment of its board of directors, resulting in losses, in the absence of bad faith or abuse of power." The proofs indicate nothing otherwise than that the present management is honest, capable, and efficient, and is earnestly working for the best interests of the corporation; also that the future looks promising. "The court may and should take judicial notice of changed economic conditions (during the past few years) affecting business generally." *Shonnard v. Elevator Supplies Co.*, 161 A. 685. Scammell, Knight & Reese, of Trenton, for complainants. McCarter & English, of Newark, for defendant.

Participation in the net profits of a corporation by the officers thereof, in addition to fixed salaries. A few words only. A by-law of a New Jersey corporation, adopted many years ago, provides for the distribution of a certain percentage of the annual net profits among the senior officers, named by positions, on the basis of respective stated percentages of the fund so allocated. Suit by a stockholder against present officers, participants in the fund, but not such until years after the adoption of the by-law, to test the validity of the by-law, and for a decree directing repayment of distributions already made and enjoining future distributions. An injunction pendente lite was granted by a United States District Court (New York). The United States Circuit Court of Appeals, Second Circuit, reverses the judgment, finding that the right to pay compen-

sation by way of a percentage of the net profits is recognized in New Jersey, and holding that the by-law was lawfully passed and was valid, effective and controlling, and that the fact that the officers in question as a result of the by-law provision coupled with the great success of the company received unusually large personal service compensation does not justify a court of equity in attempting to substitute its judgment for the judgment of the stockholders whose affair it is, in the absence of fraud. *Rogers v. Hill, et al.*, 60 F. (2d) 109. Chadbourne, Stanchfield & Levy, of New York (Nathan L. Miller, Victor J. Dowling, George W. Whiteside, and J. Arthur Leve, all of New York, of counsel), for appellants. R. R. Rogers, of New York, pro se.

New York.

Respecting the separate entities of two corporations the stock control of the one being in the hands of the other. Before directing judgment for the defendant here, a corporation controlling another, sued on account of a debt alleged to be due from the one controlled, the New York Supreme Court, Appellate Division, Fourth Department, discusses at length the separate entity status of corporations so situated as indicated above, citing and referring to many cases and other authorities. The court says: "While it is difficult to reconcile all the cases relating to this subject, there will be found running through these various authorities a broad and comprehensive rule that, where one corporation acquires sufficient stock in another to control it, the corporate entity of the two organizations will be respected and preserved where such acquisition is resorted to for the purpose of participating in the business and affairs of the owned corporation in the normal and usual manner in which the ordinary stockholder shares in the management of a corporation in which he is interested, but, where such stock ownership is acquired with the design of so dominating and regulating the subsidiary company, that it becomes a mere dummy or department of the holding company, the court will not permit the owner to escape liability for the acts of its child or alter ego, and will deal with the real party in interest, as if the dummy or substitute did not exist." *Pagel, Horton & Co., Inc. v. Harmon Paper Co.*, 258 N. Y. Sup. 168. Wickes & Neilson, of New York (Nathan F. George, of New York, of counsel), for plaintiff. Purcell, Cullen & Reynolds, of Watertown (Francis E. Cullen, of Watertown, of counsel), for defendant.

Ohio.

Executor permitted to vote stock of his decedent still standing in decedent's name. A stockholder, of large holdings, in an Ohio corporation, died. His two sons qualified as executors under his will. The stock was not transferred from the decedent's name. One of the executors voted the stock regularly for about seven years; he died; the other son, the surviving executor, appeared at a meeting for the election of directors, to which he presented a certificate of the probate judge, reciting the facts of executorship and surviving executorship, and that whatever rights the estate had were conferred upon him as sole surviving executor. He was not allowed to vote the stock; a more or less opposition board was elected. The executor, together with other stock friendly to his interests, then proceeded to elect a board of directors. "The case was presented to this court (Court of Appeals of Ohio, Cuyahoga County) upon a writ of quo warranto and a demurrer to the writ"—to oust the "opposition" board and seat the board voted for by the executor and his friends. Writ allowed. Any by-law relative to ten days' notice of change of ownership (before an election) is held to have been abrogated so far as this particular stock is concerned because of the long period of concurrence in having the stock voted; "and it would be unjust and unrighteous for a minority of the stockholders to get control of this corporation by refusing to let the majority of the stock vote under the circumstances of this case." *State ex rel. Lieghley, Pros. Atty. v. Potter et al.*, 182 N. E. 242. Thompson, Hine & Flory, of Cleveland, for relator. C. M. Vrooman, of Cleveland, for defendants.

Virginia.

On an agreement by a corporation to repurchase at a fixed price its own stock which it "sells" to a subscriber. In the instant case a promise was made by the chief executive officer of a corporation, in the name of the corporation, to repurchase at any time certain shares of the corporation's stock which the subscriber was induced to purchase on the strength of the promise, at $44.25 per share. Dividends were paid during 1927 and 1928, and for the first six months of 1929. Then occurred the great break in market values of shares of stock and of securities. The stock in question dropped to offered at $15, bid, $8. In December, 1929, request was made to the corporation to repurchase, at the price for which the sale was made, in accordance with the promise. The demand was refused and this action followed. The Supreme Court of Appeals of Virginia affirms (with a slight amendment) the judgment below for the plaintiff, one justice dissenting with a long opinion in which the broad question involved is fully discussed. The decision of the court is based, largely, on the proposition that if the contract of repurchase is valid, the plaintiff has under it a right to deliver her stock to the defendant and receive from it the price agreed upon, and that the same result follows if the contract to repurchase is

invalid for then the plaintiff is entitled to recover under the common count of money had and received, as charged in the declaration filed. "At any time" means, of course, within a reasonable time. *Grace Securities Corporation v. Roberts*, 164 S. E. 700. John A. Cutchins, of Richmond, for plaintiff in error. R. H. Talley and John S. Davenport III, both of Richmond, for defendant in error.

Foreign Corporations

Alabama.

Interstate commerce as an incident to intrastate business. The work of furnishing and setting the interior marble (mainly wainscoting on marble base in the corridors) of a building in course of erection in an Alabama city was sublet under the main building contract to a corporation foreign to Alabama, never qualified to do business in that state. The marble was to be, and was, quarried, cut to dimensions, polished, fitted ready to be set in place, numbered, and crated, at the foreign corporation's plant in Tennessee, and then shipped to Alabama; setting and anchoring in the building required expert or skilled labor; the corporation sent a qualified workman who, with the aid of local common labor, effected the setting and anchoring. One of the defenses set up against a bill filed to enforce a mechanic's lien was the doing of business in Alabama by complainant foreign corporation, though unqualified. It was contended by the corporation that the setting was an installation, merely, incident to the interstate sale and transportation and so protected by the commerce clause of the Federal constitution. The Supreme Court of Alabama, affirming the judgment below sustaining the defense, says that the contract here involved "is simply and in essence a construction contract for the erection in part of a building in Alabama. The marble wainscot was incorporated into and became a part of the building, just as structural steel, or any other part of a building. * * * In so far as interstate commerce entered into the matter, it was incident to and in execution of the construction contract." The court adds: "While, as twice mentioned in our cases, the severe rule which enables one to accept and appropriate the valuable material and labor of another without payment therefor works grave injustice, yet the public policy clearly written into our law in order that foreign corporations may be subject to the process of our courts, thus affording mutuality of remedy, cannot be stricken down by judicial decision." *Gray-Knox*

THE FIRST FO

Age, of itself, confers no merit.

The Corporation Trust Company is forty years old this month, but if its forty years represented only forty years of keeping alive, they would be little to boast of.

The Corporation Trust Company, however, is proud of its forty years: proud of them because it has not merely lived them, but during them has never for a day lost possession of the leadership with which it started.

In 1892 the company originated the now accepted idea of organized, systematized service to attorneys in corporate representation for their clients.

Alone in its business, it grew rapidly.

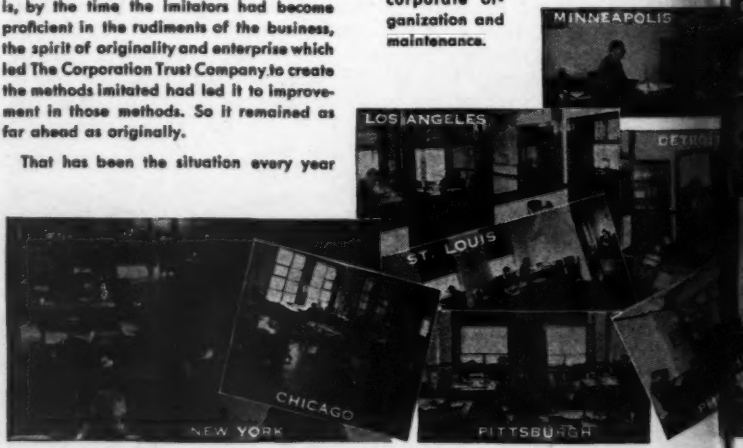
Then imitators appeared.

Faulty at first, as all imitation naturally is, by the time the imitators had become proficient in the rudiments of the business, the spirit of originality and enterprise which led The Corporation Trust Company to create the methods imitated had led it to improvement in those methods. So it remained as far ahead as originally.

That has been the situation every year of the forty, and that is the situation today.

From what originally was a staff of clerks, there has developed a great organization of technicians in corporate organization and maintenance—a technical organization grown so expert in forty years of experience that even the largest and most complete law offices find its services valuable in the carrying out of corporate plans, and the smaller law firms find the use of its assistance like having individual corporation departments of their own.

The original work of establishing and maintaining for the lawyer a statutory office for his clients has expanded into keeping in addition a precedent and experience file that gives each lawyer the practical benefits for his clients of the whole profession's experience in corporate organization and maintenance.



ORTY ~

The one little office in Jersey City has been multiplied into a vast system of offices, dotting the country, and so placed that any lawyer anywhere may put himself in personal touch with all the resources of the organization, and so equipped that he may organize a corporation as domestic, or qualify it as foreign, in any state or territory of the United States or in any province of Canada—all at a moment's notice.

So today, in its fortieth year, The Corporation Trust Company is as alone in what it furnishes to lawyers as it was in 1892, the year of its founding; it is moving forward as steadily as it moved in its pioneer years; it is as alert to improve on its methods and expand its resources wherever opportunity for real improvement or sound expansion can be found, as it was in the beginning.

The officers who navigated the company through its early years, and built up the plan of its organization, are its officers today, only every year has seen their field of activity expanded and enlarged by the development of trained assistants. The organization of The Corporation Trust Company does not change—it grows.

The first forty years are past, but the experience of them is present—and being as enterprisingly capitalized by the company as was its original idea in 1892.

So we are proud to celebrate, on December 4, 1932, our forty years of age.

Marble Co. v. Times Building Co. et al., decided October 6, 1932, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 73855.

Service of process on foreign corporation. The Alabama law provides that a foreign corporation licensed to do business in the state shall appoint a resident agent on whom process may be served. Federal law provides that in Federal courts suit may be brought either in the district of residence of the plaintiff or of that of the defendant. Suit here is by a resident of the Southern Federal District of Alabama. The named agent for service of process is located in the Northern Federal District. Process was issued out of the court in the Southern district, and served in the Northern district. Motion to quash service on the ground that process issued out of the Southern district court must be served in the Southern district. The United States District Court, S. D. of Alabama, overruling the motion says: "The state enactments declare in effect that the appointment of an agent by a nonresident corporation shall amount to its consent for process in any suit lawfully brought in the state to be served on such agent, and that such process may be served on him in any county in the state, regardless of where the suit was filed." *Wefel v. W. P. Brown & Son Lumber Co.*, 58 F. (2d) 667. Jere Austill, of Mobile, for plaintiff. Armbrecht, Hand & Twitty, of Mobile, for defendant.

Arkansas.

Service of summons on Secretary of State as statutory agent for foreign corporation withdrawn from state sufficient to give chancery court jurisdiction in suit brought to recover a personal judgment against the corporation. The Arkansas Supreme Court denies a petition for a writ of prohibition to prevent the chancery court from trying the case on the ground of want of jurisdiction as petitioner, a foreign corporation, licensed to do business in the state "had withdrawn therefrom by discontinuing its business therein and notifying the Secretary of State of Arkansas of such cessation of business and of its retirement from the state." The court says: "The solution of this question depends upon whether a foreign corporation may qualify to do business in this state, and, after incurring obligations, can withdraw from the state and defeat personal service on its agent in suits to enforce such obligations. According to the weight of authority, it cannot do so." The general rule, as "well stated in 12 R. C. L. at page 1113" is quoted. *Sydeman Bros., Inc., v. Wofford*, 49 S. W. (2d) 363. I. J. Friedman and Cravens & Cravens, all of Ft. Smith, for appellant. Hill, Fitzhugh & Brizzolara, of Ft. Smith, for appellee.

New Jersey.

New Jersey courts will not enjoin payment of a dividend by a Delaware corporation licensed to do business in New Jersey. The

directors of a Delaware corporation voted the payment of a dividend on its preferred stock. The plaintiff, one of the directors, dissented. He is a resident of New York. This is on his application for a preliminary injunction restraining the dividend payment, urging that it will not be paid from the corporation's surplus or from net profits arising from its business. The New Jersey Court of Chancery denies the application. Incidentally the court says: "I do not appreciate why he resorted to this court for relief rather than to the courts of Delaware." It is held that Section 96 of the New Jersey Corporation Act which declares that foreign corporations doing business in the state shall be subject to the provisions of such Act, so far as the same may be applied to foreign corporations, does not run to Section 30 which provides, *inter alia*, that dividends shall not be declared except from surplus or from net profits arising from the corporation's business. No proof as to the Delaware Corporation Law was submitted. The court says that it has no right to assume that the provisions thereof are similar to those of the New Jersey Act. "This court is unauthorized to regulate, or attempt to regulate, the management of the internal affairs of a foreign corporation through the medium of an injunction." "This court is without authority to substitute its judgment for the judgment of the board of directors." *Hamilton v. United Laundries Corporation*, 161 A. 347. Levitan & Levitan, of Jersey City (Abraham Levitan, of Jersey City, of counsel), for complainant. Wall, Haight, Carey & Hartpence, of Jersey City (William H. Carey, of Jersey City, and John T. Curtis, of New York City of counsel), for defendant.

New York.

Liability under New York law of directors of corporation foreign to New York to account for their official conduct. Action by the trustee in bankruptcy of a Maryland corporation, licensed to do business in New York, against its three directors "to recover funds paid out of capital for the purchase of stock of the corporation." The basis of the suit rests on New York statutes: Penal Law Sections 664 (Misconduct of officers and directors of stock corporation) and 667 (Presumption of knowledge of corporate condition and business and of assent thereto by directors); Stock Corporation Law Sections 58 (Illegal distributions to stockholders —impairing capital or reducing assets below debt and liability (including capital) requirements) and 114 (Liabilities of directors);

and General Corporation Law Section 60 (Action against directors of corporations for misconduct). Judgment for plaintiff below; one defendant appealed; because of error, the United States Circuit Court of Appeals, Second Circuit, reverses and orders a new trial. However, the court says: "Although it was a Maryland corporation, since it is licensed to do business in New York and maintains its place of business here, it must conform to the laws of New York, and any breach of the State Corporation Law which affects creditors imposes the same liability on the directors of a foreign corporation as upon a domestic corporation. The purchase of its own stock by a corporation out of its capital funds, so as to deprive creditors of rights, is a violation of 664 of the Penal Law. It is also violative of the directorate duties within subdivision 2, Section 60, of the General Corporation Law and the directors of a foreign corporation are liable in an action in this state for their violations." *In re Burnet-Clark, Limited,* 56 F. (2d) 744. Leonard & Walker of New York City (Walter B. Walker and Thomas G. Prioleau, both of New York City, of counsel), for defendant-appellant Geo. L. Maxwell. Edwin A. Falk, of New York City (Irving Steinman, of New York City, of counsel), for plaintiff-appellee Irving Trust Co. as trustee in bankruptcy for Burnet-Clark, Limited, bankrupt.

Texas.

Stockholder of an unqualified foreign corporation doing business in Texas may sue to recover property transferred by the corporation. A Delaware corporation acquired certain oil leases in Texas, and, without having obtained a permit to do business in the state, proceeded to transact business by conducting drilling operations on the acquired properties. Thereafter it assigned to another corporation a one-half interest in a large number of its oil leases. Alleging fraud and collusion a stockholder of the Delaware corporation brought suit on behalf of himself, other stockholders, and his corporation, against his corporation, its directors, and the transferee corporation. It was answered that as the Delaware corporation had been transacting business in Texas without having a permit so to do it is itself incapable of bringing the suit, and, as the corporation could not bring suit its stockholders are similarly inhibited. The trial court agreed and dismissed the suit. The Court of Civil Appeals reversed, and remanded for another trial, and now the Texas Supreme Court affirms the reversal, saying—"Fortunately the laws of this state are not subject to any such reproach. * * * If the stockholders are not permitted to maintain the action which the corporation refuses or is unable to assert, then the directors could deal as they please with the corporate property with the perfect assurance that the courts of this state would be closed to the stockholders in any effort to set aside a fraudulent disposition of the corporate property. We decline to sanction a legal proposition leading to any such result." The opinion carries an interesting discussion of the subject matter. *Pratt-Hewit Oil Corporation et al. v. Hewit et al.,*

52 S. W. (2d) 64. McDonald, Meachum & Williams, Lee, Hill, Sears & Kennerly, all of Houston, and Proctor, Vandenberge, Crain & Vandenberge, of Victoria, for plaintiffs in error. Dodson & Ezell and Arthur H. Bartelt, all of San Antonio, and J. Turner Vance, of Refugio, for defendants in error.

Taxation

Illinois.

Minimum franchise tax provisions held unconstitutional. This is a similar case, though differently prosecuted, to that between the same parties whose course underwent so many vicissitudes in the Federal courts, including the United States Supreme Court, all heretofore covered by Journal digests. There the tax involved was for 1927; here, for 1929. The Illinois statutes provide (Sec. 105, of the Corporation Act) for an annual license fee or franchise tax on a foreign corporation admitted to do business within the state (indeed, on a domestic corporation, also) equal to 5 cents on each $100 "of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located" in Illinois, such fee or tax, however, in no case to be less than would be required under the section of the statutes (Sec. 107, of the Corporation Act) providing for the imposition of a franchise tax on a foreign corporation admitted to do business in the state (and again, indeed, on a domestic corporation, also) but having no property located in Illinois and transacting no business therein. The latter section imposes a graduated fee or tax on a bracketed sliding scale basis the amount thereof being dependent on the amount of the issued capital stock, with a maximum of $1,000 in the case of a corporation with issued capital stock in excess of $20,000,000. The plaintiff-appellant here, a corporation foreign to Illinois, having a large capitalization, but doing little business in Illinois and having but a small amount of property therein, would be subject to a tax for the year 1929 of $130.25 under Sec. 105, except that its tax is not to be less than as computed under Sec. 107. Under Sec. 107 its tax is $1,000 (as the corporation is in the "excess of $20,000,000" bracket), and a tax in that amount was assessed against it; the tax was paid under protest; action to recover all over $130.25 which amount was conceded to be payable—under Sec. 105 (if the reference to and application of Sec. 107 be ignored). Reversing the court below the Supreme Court of Illinois, being "faced with the

inescapable necessity of deciding whether or not section 107, as applied to the facts in this case, is unconstitutional" holds it to be unconstitutional, as being a direct burden on interstate commerce. "This result would flow from any case where section 107 is applied, as it requires a minimum franchise tax from all corporations which have no property in this state and are transacting no business in this state. Section 107 is therefore void in its entirety, as it affords no legitimate basis for a tax and results in the imposition of taxes upon property located outside of the boundaries of Illinois, in irreconcilable conflict with the commerce clause and the Fourteenth Amendment of the Federal Constitution." We understand that a petition asking for a rehearing is to be filed. *St. Louis Southwestern Railway Co. v. Stratton, Sec'y. of State of Illinois,* decided October 22, 1932, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 74622. Whitnel & Browning, of East St. Louis, and Carter, Jones & Turney, of St. Louis, Mo., for appellant.

Michigan.

Situs of intangibles for general property tax purposes in Michigan. The Supreme Court of Michigan, reversing the court below, holds that accounts receivable arising out of sales made at its Detroit store by a Maryland chain store corporation are not subject to local general property taxes. The plaintiff foreign corporation contended that its intangibles are assessable at its domicile, only, i. e., in the state of its incorporation. The city contended that the intangibles have a "business situs" in Michigan, apart from plaintiff's domicile, for taxation purposes. Citing and quoting from several Michigan tax law decisions the court says: "Confronted by this line of decisions, involving both general and privilege taxes, it would be no less than usurpation of legislative power for the court to adopt and apply the doctrine of business situs to intangible property for the purpose of taxation. Moreover, if it had the disposition to do so, it would be restrained by the fact that the Legislature, taking notice of the repeated decisions that the doctrine could be accepted in this state only by legislative enactment, by Act No. 175, Public Acts 1929, amended the statute governing privilege taxes of corporations and provided a business situs for intangible property 'irrespective of the domicile of the corporation,' but made no such change in the general tax laws. The court must assume that the Legislature intended that the common-law rule of domiciliary situs continue to govern general taxation of property." *Reliable Stores Corporation v. City of Detroit,* 244 N. W. 208. Levin, Levin & Dill, of Detroit (Theodore Levin and Butzel, Levin & Winston, all of Detroit, of counsel), for appellant. Walter Barlow, of Detroit (Clarence E. Wilcox, of Detroit, of counsel), for appellee.

Mississippi.

Chain store tax law upheld. Chapter 90, Mississippi Laws, 1930,

imposes a tax of ¼ of 1% of the gross income (therefrom) of persons engaged in the sale (at retail) of tangible property; if any person operates more than 5 stores in the state an additional tax of ¼ of 1% on the gross income of all the stores is imposed. In this case, properly before it, a statutory three-judge court (United States District Court, S. D. Mississippi, Jackson Division) upholds the taxing statute against all contentions raised against it. On the question of the point in number at which classification is made, the power of the legislature to classify having been determined, the court says: "In Mississippi the statute draws the line between five and six * * *. We have seen that at some place in number a change takes place in basic characteristics of all the stores. After the change there are differences in organization, management and type of business transacted. Looked at by itself, without regard to the necessity of fixing the point, it may seem arbitrary to draw the line between five and six, or at any other specific point. But the cases cited (United States Supreme Court—Indiana and North Carolina laws) have judicially decided that such a line or point exists at or near which the metamorphosis takes place. There is no mathematical method of fixing it precisely, and, the function being a legislative one, its decision should be accepted unless palpably unfair and oppressive. When the transformation is accomplished, the reaction is the same upon the first five stores as upon the succeeding ones. Therefore there is no vice in fixing the same measure of taxation for each of the stores in the entire chain." *Penny Stores, Inc. v. Mitchell, Atty. Gen'l. of Mississippi, et al.*, 59 F. (2d) 789. Watkins, Watkins & Eager, of Jackson, for plaintiff. J. A. Lauderdale, Asst. Atty. Gen., and W. L. Guice, Sp. Counsel, of Biloxi, for defendants.

Texas.

Franchise Tax Law held valid. The 1930 Franchise Tax Law of Texas was assailed here by both domestic and foreign corporations on various grounds. The United States District Court for the Western District of Texas, Austin Division, analyzing and answering each of the principal grounds of complaint, sustains the act against all contrary contentions,—and "it is determined that the law as further amended in 1931, is, for the same reasons, equally valid." The principal grounds of complaint were, as stated by the court: "(1) That there is discrimination against domestic corporations on account of the fact that foreign corporations obtaining permits to do

business in the State are not required to pay a franchise tax until the end of the first year, whereas the domestic corporations pay annually in advance. (2) That the act is discriminatory, arbitrary and unreasonable and the tax exacted thereunder unequal and lacking in uniformity, for the reason that outstanding indebtedness, evidenced by bonds, debentures or notes with maturities greater than one year, is considered as part of the capital funds of the corporation in determining the tax to be paid. (3) That the act is unconstitutional by reason of its violation of the provisions of the State Constitution for uniform and equal taxation. (4) That the act is void in that it attempts to tax liabilities incurred and outstanding beyond and outside the confines of the State. (5) That the act constitutes a denial of due process in that: (a) The determination of surplus and undivided profits is a matter of uncertainty and opinion; (b) The portion of the gross receipts from the business done in Texas is uncertain; (c) No machinery is set up for the ascertainment of the truth or falsity of the reports made, which fact operates to the detriment of honest tax payers," and various other subdivisions here, complaining generally of alleged absolute discretion vested in the Secretary of State, of want of notice and hearing, and excessive penalties. Exception is allowed and, in open court, plaintiffs gave notice of appeal. *Southern Realty Corporation et al. v. Jane Y. McCallum, Secretary of State, et al.*, decided October 17, 1932. McCormick, Bromberg, Leftwitch & Carrington (Paul Carrington, of counsel), of Dallas; Polk & Sansom, of Fort Worth; Rice, Hyman & Suggs, of Dallas; Ben H. Powell, of Austin: for various plaintiffs, respectively.

CORPORATE MEETINGS HELD

During the past few weeks meetings of the corporations named below, among many others, have been held at some one of the offices of The Corporation Trust Company.

General Motors Radio Corporation
Ridder Brothers, Incorporated
National Toll Bridge Company
Safety Cable Company
Carleton and Hovey Company
National Credit Corporation
The Baltimore Terminal Company
American Ship Building Company
General Aviation Corporation
The Lehman Corporation
Cinema Credits Corporation
Pocono Hotels Corporation
The United Corporation
Central States Edison Corporation
Minerals Separation North American Corporation
B. H. Howell & Son Company, Incorporated
Lord Baltimore Products, Incorporated

Some Important Matters for December and January

This calendar does not purport to cover general taxes or reports to other than state officials, or those we have been officially advised are not required to be filed. *The State Report and Tax Service* maintained by *The Corporation Trust Company System* sends timely notice to attorneys for subscribing corporations of report and tax matters requiring attention from time to time, furnishing information regarding forms, practices and rulings.

ALABAMA—Annual Application Fee for permit to do business due February 1.—Domestic and Foreign Corporations.

ALASKA—Annual Corporation Tax due on or before January 1.—Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January.—Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report due between January 1 and January 20.—Domestic Corporations.

GEORGIA—Annual License Tax Report due on or before January 1.—Domestic and Foreign Corporations.

KENTUCKY—Annual Report due on or before February 1.—Domestic and Foreign Corporations.

License Tax Report of Retail Merchants due on or before February 1.—Domestic and Foreign Corporations doing business as retail merchants.

LOUISIANA—Annual Report due on or before February 1.—Domestic Corporations.

NEW JERSEY—Annual Franchise Tax Report due on or before first Tuesday in February.—Domestic Corporations.

NEW YORK—Annual Franchise Tax based on Income of Business Corporations due on or before January 1.—Domestic and Foreign Business Corporations other than realty and holding companies.

OHIO—Report to Industrial Commission due during January.—Domestic and Foreign Corporations.

SOUTH CAROLINA—Annual Statement due on or before January 31.—Foreign Corporations.

UNITED STATES—Fourth Instalment of Income Tax imposed for the calendar year 1931 due on or before December 15.—Domestic Corporations and Foreign Corporations having an office or place of business in the United States.

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business The Corporation Trust Company publishes the following supplementary pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

Amateur Corporate Representation. A booklet dealing with some of the weaknesses of placing a company's statutory representation in the hands of business employes or others not trained in the matters involved.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation, completely revised to reflect the changes made by the amendments of 1931.

Incorporation in Canada Under the Dominion Act. Explains the procedure for incorporation of Canadian companies, the requirements, taxes, maintenance of office, etc., and all the special features of the Dominion Companies Act. Attorneys with a client who may, because of tariff barriers, be considering the organization of a Canadian company to conduct the company's Canadian or export business, will find this pamphlet extremely useful.

When Corporations Cross the Line. A simple explanation of the reasons for and purposes of the foreign corporation laws of the various states, and illustrations of when and how a corporation makes itself amenable to them. Of interest both to attorneys and to corporation officials.

What Constitutes Doing Business. (Revised to April, 1930.) A 208-page book containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business." The digests are arranged by state, but a Table of Cases and a Topical Index make them accessible also by either case name or topic.

Questionnaire on Business Outside State of Organization. This is a form for attorney's use in determining when a corporation should be qualified. The questions are those which will usually bring out the points necessary to be considered.

Why a Transfer Agent? The question of why corporations, even those of small capitalization or with inactive or closely held stock, are safer when their stock records are in the hands of an experienced transfer agent is answered in this pamphlet by actual incidents from the experiences of different corporations.

Why Corporations Leave Home. This is an informal discussion, from the business man's point of view and in layman's language, of why so many business companies are organized under the laws of Delaware instead of in their home states. While primarily for laymen, lawyers also find this pamphlet useful when considering the matter of what state to choose for incorporation of a client's business.

Transfer Requirements Chart. This supplement to The Stock Transfer Guide and Service shows the classifications into which requests for stock transfer are divided and how the principal requirements for each classification may be determined, either by the transfer agent or the individual desiring transfer made.